SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. ~~693~~ 29

B. CLINTON WATSON, ET UX.,
Appellants,

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

BENJAMIN C. KING,
CHARLES D. EGAN,
Counsel for Appellees.

INDEX

Subject Index

Table of Cases Cited

STATUTES CITED

IN THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 14316

B. CLINTON WATSON, ET UX.,

Appellants,

versus

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD., ET AL.,

Appellees

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Appellee, Employers Liability Assurance Corporation, Ltd., in its statement in opposition to appellants' jurisdictional statement herein and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

1. Statement of Issues on Appeal

The facts set forth in appellants' jurisdictional statement are corrected and modified to show the following:

It is undisputed that a policy of public liability insurance was issued and delivered by appellee, Employers Liability Assurance Corporation, Ltd., to the Gillette Safety Razor

Company and a copy of said policy was delivered to The Toni Company, a division of the Gillette Safety Razor Company, in Chicago, Illinois. After the policy was issued, but before the present action was brought, the name of the Gillette Safety Razor Company was changed to The Gillette Company. The policy of insurance covered liability "imposed by law" upon the assureds, Gillette Safety Razor Company, The Toni Company, and The Gillette Company, arising out of the use of the products of the named insureds. The policy contained, among others, the following provisions (referred to by appellants as a "no action" clause), to-wit:

> "*No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company:*
>
> "Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. *Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.*" (Italics ours.)
>
> "Terms of this policy which are in conflict with the statutes of the state wherein this policy is *issued* are hereby amended to conform to such statutes." (Italics ours.)

It is undisputed that the provisions of the policy hereinabove quoted were entirely lawful and valid under the laws of Massachusetts and Illinois; that the obligation of the assureds, if any obligation there be to appellants, has never been determined, either by judgment against the assureds

or by written agreement of the assureds, the claimant and the insurance company; and that under the laws of Massachusetts and Illinois a direct action against Employers Liability Assurance Corporation, Ltd., prior to the determination of the assureds' obligation, either by judgment against the assureds after actual trial or by agreement, is prohibited.

Appellants, relying upon the provisions of Section 655 of Title 22 of the Louisiana Revised Statutes of 1950 (the Louisiana Direct Action Statute), proceeded in the original complaint against Employers Liability Assurance Corporation, Ltd., alone. Supplemental and amended complaints were filed, seeking to join Gillette Safety Razor Company and The Gillette Company as defendants and praying for judgment against said companies, in solido.

It is undisputed that appellants' cause of action is based upon the alleged negligence of The Gillette Company and Gillette Safety Razor Company, and that appellants have no cause of action against the Employers Liability Assurance Corporation, Ltd., unless they have a cause of action against Gillette Safety Razor Company and The Gillette Company.

It is undisputed that Gillette Safety Razor Company, The Gillette Company and The Toni Company have never been authorized to do business in the State of Louisiana, and that the product referred to by appellants as a "Toni Home Permanent" was manufactured in Illinois and sold to appellants by Morgan & Lindsey Company in Arcadia, Louisiana.

Appellee, Employers Liability Assurance Corporation, Ltd., moved to dismiss the action on that ground that "Section 655 of Title 22 of the Louisiana Revised Statutes of 1950 and Acts 541 and 542 of the Louisiana Legislative Session of 1950, under which this proceeding is brought, *do not apply under the facts of this case, or, if applicable,*

violat[illegible] the provisions of the Federal and Louisiana Constitutions", namely, Section 1, Article 4 (full faith and credit), Section 10, Article 1 (impair the obligations of a contract), Section 1 of the Fourteenth Amendment (due process and equal protection of laws) of the Constitution of the United States, and Section 15 of Article 4 of the Constitution of the State of Louisiana.[1]

The judgment of the District Court, which was affirmed by the Court of Appeals, dismissed the entire action, not only as to Employers Liability Assurance Corporation, Ltd., but also as to Gillette Safety Razor Company and The Gillette Company. Gillette Safety Razor Company and The Gillette Company were parties of record in the Court of Appeals.

It is undisputed that the Louisiana Direct Action Statutes are valid and presently apply to policies written and delivered by foreign public liability insurers in Louisiana. The Court of Appeals did not declare that the said statutes are invalid, but construed the statutes and declared that, if construed to have extra-territorial effect, they violate the appellee's constitutional rights.[2]

---

[1] The applicable grounds of the motion to dismiss filed by Employers Liability Assurance Corporation, Ltd. are set forth at length in Footnote 5 of the opinion of the Court of Appeals, a copy of which is attached to appellants' jurisdictional statement.

[2] "We find ourselves, however, in complete accord with the views of the district judge that if the statute *is construed* as extending to and invalidating the 'no action' provision of a policy written and delivered, as this one was, outside of the state, the statute represents *an attempt to give extra territorial effect to Louisiana laws and to subject to them the doing of business, and the business done, in other states. So construed*, we are in doubt that, as contended by Employers and as found by the district judge, it violates the defendant's constitutional rights.

"This being so, it is clear that the decisions which settle it that consent to the deprivation of constitutional rights given as the extorted price of doing business in a state cannot prevent the assertion of those rights when they are challenged or sought to be denied, apply in full vigor here." (See opinion of the Court of Appeals.) (Italics ours.)

2. Motion to Dismiss

Appellee, Employers Liability Assurance Corporation, Ltd., pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed for the following reasons:

(1) Appellee does not contend, nor did the Court of Appeals hold, that the state statutes involved are invalid, but only that they are inapplicable to the facts of this case. The judgment of the court below went no further than a holding that the statutes, if construed to apply to the facts of this case, violate the defendant's constitutional rights in the respects stated in the opinion. The appeal herein should be dismissed for want of jurisdiction, it appearing that the Court of Appeals, in determining this case, did not hold state statutes to be invalid as repugnant to the Constitution, treaties or laws of the United States, but merely construed the same. The provisions of the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. 1254(2), are therefore inapplicable.

Knop v. *Monongahela River Consol. Coal & Coke Co.*, 211 U. S. 485, 487, 488, 53 L. Ed. 294, 295, 29 S. Ct. 188;

Bradford Electric Light Co. v. *Clapper*, 284 U. S. 221, 224, 225, 76 L. Ed. 254, 255, 256, 52 S. Ct. 118;

Westling v. *U. S.*, 288 U. S. 590, 591, 77 L. Ed. 969, 53 S. Ct. 490;

Brackett Co. v. *Chamberlain Co.*, 299 U. S. 503, 504, 81 L. Ed. 373, 57 S. Ct. 16;

Slaker v. *O'Connor*, 278 U. S. 188, 73 L. Ed. 258, 49 S. Ct. 158;

Public Serv. Commission v. *Batesville Teleph. Co.*, 284 U. S. 6, 76 L. Ed. 135, 52 S. Ct. 1;

Baxter v. *Continental Casualty Co.*, 284 U. S. 578, 76 L. Ed. 502, 52 S. Ct. 2;

Ferry v. *King County*, 141 U. S. 668, 35 L. Ed. 895, 12 S. Ct. 128.

(2) In the alternative, even if it be found that the Court of Appeals' decision rests, in part, upon a holding that the state statutes are invalid, nevertheless the decision also rests upon wholly independent grounds insofar as The Gillette Company and Gillette Safety Razor Company are concerned, which are not subject to review by means of appeal under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. 1254(2), and the appeal should not be entertained.

United States v. *Hastings*, 296 U. S. 188, 193, 80 L. Ed. 148, 150, 151, 56 S. Ct. 218.

(3) Citations were not served upon The Gillette Company and Gillette Safety Razor Company, parties of record in the court below, as prescribed by Rule 10 of the Revised Rules of the Supreme Court of the United States. This omission was deliberate on the part of the appellants and did not result from accident or mistake.[3]

Osage Oil & Refining Co. v. *Mulver Oil Co.*, 38 F. (2d) 396.

(4) The appeal should be dismissed for want of proper parties, as The Gillette Company and Gillette Safety Razor Company, parties of record in the court below, in whose favor, as well as Employers Liability Assurance Corporation, Ltd., the decree was rendered, are directly and vitally interested therein and are necessary parties to the appeal.

---

[3] "That portion of the case however, that is, the portion involving the Gillette Safety Razor Company as a defendant is not involved in this appeal." (See appellants' jurisdictional statement.)

Appellants' jurisdictional statement shows that the cause of action is based upon the asserted negligence of The Gillette Company and Gillette Safety Razor Company, and any final decision in this case would require a determination thereof. The case should not be brought up by appeal in fragments or piecemeal.

Metropolitan Trust Co. of City of New York, In Re, 218 U. S. 312, 320, 54 L. Ed. 1051, 1054, 31 S. Ct. 18;

Wilson v. *Kiesel*, 164 U. S. 248, 251, 41 L. Ed. 422, 423, 17 S. Ct. 124;

Hartford Accident & Indemnity Co. v. *Bunn*, 285 U. S. 169, 76 L. Ed. 685, 52 S. Ct. 354;

Collins v. *Miller*, 252 U. S. 364, 64 L. Ed. 616, 40 S. Ct. 347;

Arnold v. *United States*, 263 U. S. 427, 68 L. Ed. 371, 44 S. Ct. 144;

Martinez v. *International Banking Corp.*, 220 U. S. 214, 55 L. Ed. 438, 31 S. Ct. 408.

(5) The assignment of errors accompanying this appeal does not set out expressly and particularly each error asserted. Vague and general statements are substituted for the particularity prescribed by Rule 9 of the Revised Rules of the Supreme Court of the United States.

Seaboard Air Line R. Co. v. *Watson*, 287 U. S. 86, 91, 77 L. Ed. 180, 184, 53 S. Ct. 32;

Phillips & Colby Constr. Co. v. *Seymour*, 91 U. S. 646, 648, 23 L. Ed. 341, 342;

Briscoe v. *Rudolph*, 221 U. S. 547, 549, 550, 55 L. Ed. 848-850, 31 S. Ct. 679.

3. Motion to Affirm

Appellee, Employers Liability Assurance Corporation, Ltd., pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the

judgment of the court below be affirmed for the following reasons:

(1) The mere construction of a state statute does not present a Federal question.

Knop v. *Monongahela River Consol. Coal & Coke Co.*, 211 U. S. 485, 487, 488, 53 L. Ed. 294, 295, 29 S. Ct. 188.

(2) The questions on which the decision of the case depends are so well settled as not to need further argument. It is well settled that, although a state may limit or prohibit the making of certain contracts within its own territory, it cannot extend the effects of its laws beyond its boundaries so as to destroy or impair the rights of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made.

Hartford Accident & Indemnity Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 149, 150, 78 L. Ed. 1178, 1181, 1182, 54 S. Ct. 634;

New York L. Ins. Co. v. *Head*, 234 U. S. 149, 58 L. Ed. 1259, 34 S. Ct. 879;

Aetna L. Ins. Co. v. *Dunken*, 266 U. S. 389, 399, 62 L. Ed. 342, 349, 45 S. Ct. 129;

Home Ins. Co. v. *Dick*, 281 U. S. 397, 407, 408, 74 L. Ed. 926, 933, 934, 50 S. Ct. 338.

Consent to the deprivation of constitutional rights given as the extorted price of doing business in a state cannot prevent the assertion of its rights when they are challenged or sought to be denied.

Home Insurance Co. of New York v. *Morse*, 87 U. S. 445, 20 Wall. 445, 22 L. Ed. 365;

Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389, 400, 72 L. Ed. 927, 929, 48 S. Ct. 553;

Terral v. *Burke Constr. Co.*, 257 U. S. 529, 66 L. Ed. 352, 42 S. Ct. 188;

Hanover Fire Ins. Co. v. *Carr*, 272 U. S. 494, 71 L. Ed. 372, 47 S. Ct. 179;

Frost v. *Railroad Commission of California*, 271 U. S. 583, 70 L. Ed. 1101, 46 S. Ct. 605;

Security Mut. Life Ins. Co. v. *Prewitt*, 202 U. S. 246, 50 L. Ed. 1013, 26 S. Ct. 619;

Power Manufacturing Co. v. *Saunders*, 274 U. S. 490, 71 L. Ed. 1165, 47 S. Ct. 678;

W. W. Cargill Co. v. *Minnesota*, 180 U. S. 452, 45 L. Ed. 619, 21 S. Ct. 423;

Buck v. *Kuykendall*, 267 U. S. 307, 69 L. Ed. 623, 45 S. Ct. 324;

Lafayette Insurance Co. v. *French*, 59 U. S. 404, 18 How. 404, 15 L. Ed. 451;

Barron v. *Burnside*, 121 U. S. 186, 30 L. Ed. 915, 7 S. Ct. 931;

Southern Pac. Co. v. *Denton*, 146 U. S. 202, 207, 36 L. Ed. 942, 945, 13 S. Ct. 44;

Connecticut General Life Ins. Co. v. *Johnson*, 303 U. S. 77, 79, 80, 82 L. Ed. 673, 677, 58 S. Ct. 436;

Williams v. *Standard Oil Co. of La.*, 278 U. S. 235, 241, 73 L. Ed. 287, 49 S. Ct. 115;

State of Washington ex rel. Bond & Goodwin & Tucker v. *Superior*, 289 U. S. 361, 77 L. Ed. 1256, 1260, 53 S. Ct. 624;

Phillips Petroleum Co. v. *Jenkins*, 297 U. S. 629, 80 L. Ed. 943, 56 S. Ct. 611;

Schwegmann Bros. v. *La. Board*, 216 La. 148, 43 So. (2d) 248.

(3) Appellee's obligations under the contract of insurance cannot be enlarged by reason of the alleged interest of the State of Louisiana in the transaction.

Hartford Accident & Indemnity Co. v. *Delta & Pine Land Co.*, 292 U. S. 143, 149, 150, 78 L. Ed. 1178, 1181, 1182, 54 S. Ct. 634.

For the foregoing reasons, it is evident that a direct appeal from the Court of Appeals for the Fifth Circuit should not be allowed under the facts of this case and that this appeal presents no substantial question. It is, therefore, respectfully submitted that the within appeal should be dismissed, or that the judgment and decree of the Court of Appeals for the Fifth Circuit should be affirmed.

Dated this 19th day of March, 1953.

(Signed) Benjamin C. King,
(Signed) Charles D. Egan,
Attorneys for Appellee.